06-126

No. _____

Supreme Court, U.S.
FILED
JUN 20 2006
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In The

Supreme Court Of The United States

"In re Eddie Lee Galloway"

Petitioner

ON PETITION FOR AN EXTRAORDINARY WRIT
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR AN EXTRAORDINARY WRIT

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QUESTION PRESENTED

Does a state Prisoner have a right to a petition for writ of habeas corpus under Title 28 U.S.C.A. § 2241 or a writ of mandamus to challenge a defective opinion whereas a state appeal court justice has lied in his opinion to uphold a murder for hire?

Does a state Prisoner have a right to a petition for writ of habeas corpus under Title 28 U.S.C.A. § 2241 or a writ of mandamus proving he is "Legally Innocent" "Actually Innocent" and "Factually Innocent" beyond a reasonable doubt pursuant to the Supreme Court precedents?

Does a state Prisoner have a right to a petition for writ of habeas corpus under Title 28 U.S.C.A. § 2241 or a writ of mandamus whereas the opinion is objectively unreasonable and a violation of clearly established federal law as determined by the Supreme Court of the United States?

Does a state Prisoner have a right to a petition for writ of habeas corpus under Title 28 U.S.C.A. § 2241 or a writ of mandamus proving the Second Appellate Court of Appeal Division Seven's January 20, 2004, denial of Petitioner's petition for writ of habeas corpus, contrary to, and involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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This Extraordinary Writ be in aid of the Court's Appellate jurisdiction the exceptional circumstances warrants the exercise of the Court's discretionary power; because a "Legally Innocent," "Actually Innocent," "Factually Innocent" man been: label as a vexatious litigant and the adequate relief cannot be obtained in any other form or any other court.

Petitioner Eddie Lee Galloway respectfully request that an Extraordinary Writ be issued to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The order of the Unite States Court of Appeals for the Ninth Circuit (App. A). The order of the district court (App. B). The opinion of the State Court of Appeal *People v. Galloway* 273 Cal. Rptr. 167 (1990) (App. C). The California Supreme Court denial of petition for writ of habeas corpus (App. D).

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on November 29, 2005 (App. A).

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part; "No person, shall ... be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides in relevant part; "No state make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Title 28 U.S.C. Section 1651(a) provides:

The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictional and agreeable to the usages and principles of law.

Title 28 U.S.C. Section 2241(c)(3) provides:

"The writ of habeas corpus shall not extend to a Prisoner unless ... [h]e is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

The fundamental question in this case is whether a state Prisoner is entitle to relief whereas a State Court Of Appeal Justice has lied in his opinion to uphold a murder for hire conviction against an innocen. man that's "Legally Innocent" "Actually Innocent" and "Factually Innocent."

A. Background of the 1990 Judgment.

On September 1, 1990, Justice Norvell F. Woods Jr. Opinion was rendered in *People v. Galloway* 273 Cal. Rptr. 167 (1990) opinion modified September 21, 1990 reviewed denied December 20, 1990.

Justice Norvell F. Woods Jr. has lied in his opinion to uphold a murder for hire conviction stating; in relevant part; the following evidence satisfied the substantial evidence test and establishes the nexus between appellant's conduct and the victim's death; appellant photograph of the victim, a photograph of the victim's house, the victim's social sent a security number and $6000 to a professional in St. Louis to have the victim killed; the victim appeared to have been killed by a professional; the bathroom screen was removed and never found no fingerprints or other physical evidence were recovered (App. C. at 31a).

When it appear that the state has engaged in MISCONDUCT the burden falls upon the People to prove, by preponderance of the evidence that sanctions are not warranted because the defendant was not prejudice by the MISCONDUCT *Nix v. Williams* 467 U.S. 431 444 (1984) *Murphy v. Waterfront Com'n* 378 U.S. 52, 79 n. 18 (1964).

B. The Proceeding Below

On December 24, 2003, Petitioner mailed a petition for writ of habeas corpus to the Court of Appeal Second Appellate District Division Seven raising one crucial issue for relief Case No. B163148.

The Court Appeal's bias and prejudice opinion upholding a murder for hire conviction is objectively unreasonable and a violation of clearly established federal law as determined by the Supreme Court of the United States.

Petitioner filed a motion to augment record with a petition for writ of habeas corpus pursuant to California's Rules of Court Rule 12(a), 33(b), and 43 requesting two crucial pieces of evidence. The name of the person from St. Louis Mo that testified at Petitioner's trial that Petitioner sent him/her a photograph of Frank C. Webb, a photograph of Webb's house, Webb's social Security number and $6000 to kill Frank C. Webb.

A copy of this person from St. Louis Mo testimony whereas he/she testified that he/she received from Eddie Lee Galloway a photograph of Frank C. Webb, a photograph of Webb's house, Webb's social security number and $6000 to kill Frank C. Webb.

On January 20, 2004, the Second Appellate Court of Appeal Division Seven denied the petition without comment.

On February 06, 2004 Petitioner filed a petition for writ of habeas corpus in California Supreme Court bringing forth two crucial grounds for relief.

The Court of Appeal's bias and prejudice opinion upholding a murder for hire conviction is objectively unreasonable and a violation of clearly established federal law as determined by the Supreme Court of the United States. The Second Appellate Court of Appeal Division Seven's January 20, 2004, denial of Petitioner's petition for writ of habeas corpus are contrary to, and involves an unreasonable application of clearly established federal law as determined by The Supreme Court of the United States 28 U.S.C. § 2254(d)(1).

Petitioner filed a motion to augment record with a petition for writ of habeas corpus pursuant to California's Rules of Court Rule 12(a), 33(b) and 43 requesting the following documents.

(a) The name of the person from St. Louis Mo. That testified at Petitioner's trial, that Petitioner sent him/her a photograph of Frank C. Webb, a photograph of Webb's house, Webb's social security number and $6000 to kill Frank C. Webb.

(b) A copy of this person from St. Louis Mo testimony whereas he/she testified that he/she received from Eddie Lee Galloway a photograph of Frank C. Webb, a photograph of Webb's house Webb's social security number and $6000, and that he/she stated that he/she killed Frank C. Webb for Eddie Lee Galloway.

This motion is based upon this Court's ruling and holding in *Brady v. Maryland* 373 U.S. 83 (1953); *Kyle v. Whitley* 514 U.S.419 (1995); *Strickler v. Greene* 527 U.S. 263 (1999); *United States v. Agurs* 427 U.S. 97 (1976); *United States v. Bagley* 473 U.S. 667 (1985); *Harris v. Nelson* 394 U.S. and *Napue v. Illinois* 306 U.S. 269 (1959.

On December 15, 2004, The Supreme Court of California stated; petition for writ of habeas corpus denied (see *In re Robbins* 18 Cal.4th 770, 780 (1993); *In re Clark* 5 Cal.4th 750 (1993); *In re Waltreus* 62 Cal.2d 218 (1965); *In re Lindley* 29 Cal.2d 709 (1947) (App. D at 36a).

On January 10, 2005, Petitioner filed a petition in the United States Court of Appeals for the Ninth Circuit for an Application to file a Second or Successive 28 U.S.C. § 2254 petition Case No. 05-70042 bringing forth the two crucial grounds Supra for relief.

On February 10, 2005, the United States Court of Appeals for the Ninth Circuit denied the petition (App. A at 1a).

On September 14, 2005, the United States District Court Central District of California Case Number CV-91-0231 CBM (RC) received Petitioner's petition for writ of habeas corpus pursuant to 28 U. S.C. § 2241 bringing forth the two grounds Supra for relief. A motion was enclosed pursuant to Rule 6(a) governing writ of habeas" corpus requesting the two crucial pieces of evidence requested in the motion to augment record with a petition for writ of habeas corpus Supra.

On September 21, 2005, the District Court stated;

NOTICE AND ORDER RE FILING BY VEXATIOUS LITIGANT

[X] Complaint/Petition

[X] Court Order is needed to file a new action.

[X] Other Mr. Galloway submitted $5.00 filing fee for filing a petition for writ of H/C

IT IS HEREBY ORDERED THAT PLAINTIFF

[X] may not file the document presented in the above-referenced matter. (App. B at 5a).

On October 19, 2005, Petitioner petition the -- United States Court of Appeals for the Ninth Circuit for a writ of mandamus case No 05-75974, requesting approval for the District Court to process Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 and Petitioner's motion for discovery pursuant to Rule 6(a) governing writ of habeas corpus.

REASON FOR GRANTING THE WRIT

I.

A STATE PRISONER HAVE A RIGHT TO A PETITION FOR WRIT OF HABEAS CORPUS UNDER TITLE 28 U.S.C. § 2241 OR A WRIT OF MANDAMUS TO CHALLENGE A DEFECTIVE OPINION WHEREAS A STATE APPEAL COURT JUSTICE HAS LIED IN HIS OPINION TO UPHOLD A MURDER FOR HIRE CONVICTION.

No one from St. Louis Mo., testified during Petitioner's trial that I Eddie Lee Galloway sent him/her a photograph of Frank C. Webb, a photograph of Webb's house, Webb's social security number and $6000 to kill Frank C. Webb.

When it appear that the state has engaged in MISCONDUCT the burden falls upon the People to prove, by preponderance of the evidence that sanctions are not warranted because the defendant was not prejudice by the MISCONDUCT. *Nix v. Williams* 467 U.S. 431 444 (1984) *Murphy v. Waterfront Com'n* 387 U.S. 52 79 n 18 (1964).

A necessary predicate for the granting of federal habeas relief to State Prisoners is a determination by the Federal Court that such custody violated the Constitution, laws or treaties of the United States 28 U.S.C. § 2241 *Rose v. Hodge* 432 U.S. 19 21 (1975).

Due Process clause of Fourteenth Amendment safeguard against dilution of principle that guilt is to be established by probative evidence U.S.C.A. Constitution Amendment Fourteenth *Taylor v. Kentucky* 436 U.S. 478, 486-488 (1978).

Equal protection clause's command that no state shall deny to any person within it jurisdiction the equal protection of the laws U.S.C.A. Constitution Amendment Fourteenth is essentially a direction that all person similarity situated should be treated alike *City Of Cleburne Tex. v. Cleburne Living Center* 473 U.S. 432, 439 (1985).

The United States Supreme Court has the duty to make its own independent examination of the record to determine facts when Federal Constitutional deprivation

are alleged *Napue v. Illinois* 360 U.S. 264, 271-272 (1959).

In cases in which there is a claim of denial of rights under the Federal Constitution, the United States Supreme Court is not bound by factual conclusion of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded *Napue v. Illinois* 360 U.S. 264, 272 (1959).

II.

A STATE PRISONER HAVE A RIGHT TO A PETITION FOR WRIT OF HABEAS CORPUS UNDER TITLE 28 U.S.C. § 2241 OR A WRIT OF MANDAMUS PROVING HE IS "LEGALLY INNOCENT" "ACTUALLY INNOCENT" AND "FACTUALLY INNOCENT" BEYOND A REASONABLE DOUBT PURSUING TO THE UNITED STATES SUPREME COURT PRECEDENTS.

Petitioner's "Legally Innocent" claim must be reviewed under the Reasonable Doubt Standard; because no one from St. Louis Mo. testified to the allegations Justice Norvell F. Woods Jr. has alleged in his opinion in relevant part; The following evidence satisfies the substantial

evidence test, and establishes the nexus between appellant's conduct and the victim's death; appellant sent a photograph of the victim, a photograph of the victim's house, the victim's social security number and $6000 to a professional in St. Louis to have the victim killed; the victim appeared to have been killed by a professional; the bathroom screen was removed and never found; no fingerprints or other physical evidence were recovered. (App.C at 31a). Proof beyond a reasonable doubt is required to established guilt of criminal charge. *In re Winship* 397 U.S. 356, 361 (1970).

Reasonable Doubt Standard of criminal law has Constitutional stature, and due process clause protects accused against conviction except upon proof beyond reasonable doubt every fact necessary to constitute crime with which he is charged U.S.C.A. Constitution Amendment Fourteenth *In re Winship* 397 U.S. 356, 357, 374 (1970).

Due process requires that no person be made to suffer onus of a criminal conviction except upon sufficient proof, defined as evidence necessary to conclude a trier of fact beyond reasonable doubt of the existence of every element of the offense U.S.C.A. Constitution. Amendment Fourteenth *Jackson v. Virginia* 443 U.S. 307, 315-318 (1970).

Petitioner's "Actually Innocent" and "Factually Innocent" claim must be reviewed in accordance with the United State Supreme Court ruling and holding in *Schlup v. Delo* 513 U.S. 298, 316-324-327 (1995) because no one from St.

Louis, Mo. testified that I, Eddie Lee Galloway sent them a photograph of the victim, a photograph of the victim's house, the victim's social security number and $6000 to a professional in St. Louis to have the victim killed; Petitioner has filed motion after motion to augment record with a petition for writ of habeas corpus pursuant to California's Rules of Court Rule 12(a), 33(b), and 43 requesting the name of the person that testified at Petitioner's trial that I Eddie Lee Galloway sent him/her a photograph of the victim, the victim's social security number and $6000. The Court of appeal and the California Supreme Court both has refused to process the motion and the petition for writ of habeas corpus; because Petitioner is "Legally Innocent" "Actually Innocent, and "Factually Innocent" beyond a reasonable doubt and the record will prove-it and Justice Norvell F. Woods Jr. has lied in his opinion to uphold a murder for hire conviction (App. C. at 31a).

In extraordinary case, when Constitutional Violation has probably resulted in conviction of one who is "Actually Innocent" Federal habeas Court may grant writ even in absence of showing of cause for procedural defaults. *Murray v. Carrier* 477 U.S. 478 495 496 (1986).

Principle that a state may not knowingly use false evidence, including, false testimony to obtain a tainted conviction implicit in any concept of ordered liberty does not cease to apply merely because the false testimony goes only to credibility of the witness. United States Constitution Amendment Fourteenth *Napue v. Illinois* 330 U.S. 264, 269-270 (1959).

State enforcement of it's criminal laws must comply with principle of substantial equality and fair procedure that are embodied in Fourteenth Amendment to the United States Constitution *McCoy v. Court Of Appeal Of Wisconsin Dist* 1 486 U.S. 429 (1988).

III.

A STATE PRISONER HAVE A RIGHT TO A PETITION FOR A WRIT OF HABEAS CORPUS UNDER TITLE 28 U.S.C. SECTION 2241 OR A WRIT OF MANDAMUS WHEREAS THE OPINION IS OBJECTIVELY UNREASONABLE AND A VIOLATION OF CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES.

The Second Appellate Court of Appeal Division Seven's Justice Norvell F. Woods Jr. Reckless Disregard in his opinion for Galloway Federal Constitutional right, the laws and treaties of the United States. (See *Robinson v. California* 370 U.S. 660, 669 (1968).

Justice Norvell F. Woods Jr. Reckless Disregard for Galloway's Federal Constitutional right has caused him to suffer a serious "Substantial and Injurious effect." (See *Brecht v. Abrahamson* 507 U.S. 619, 637, (1993)

In deciding whether a state court's application of United States Supreme Court precedent was unreasonable, thus warranting habeas relief, court considers whether the application was unreasonable. 28 U.S.C.A. § 2254(d)(1) *Penry v. Johnson* 531 U.S. 1003, (2001).

IV.

A STATE PRISONER HAVE A RIGHT TO A PETITION FOR WRIT OF HABEAS CORPUS UNDER TITLE 28 U.S.C. SECTION 2241 OR A WRIT OF MANDAMUS PROVING THE SECOND APPELLATE COURT OF APPEAL DIVISION SEVEN'S JANUARY 20, 2004, DENIAL OF PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS, CONTRARY TO, AND INVOLVES AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES.

The Court of Appeal was obligated pursuant to this court's precedents to process Petitioner's petition for writ of habeas corpus and the motion to augment record with a writ of habeas corpus and provide Petitioner with the name of the person that testified at Petitioner's trial, his/her testimony whereas he/she testified that I, Eddie Lee Galloway, sent him/her a photograph of Frank C. Webb, a photograph of Webb's house, Webb's social security

number and $6000 to kill Frank C. Webb pursuant to this Court's ruling and holding in *Kyle v. Whitley* 514 U.S. 419, 433, 437, 438 (1995) and *Strickler v. Greene* 527 U.S. 263, ,(1999).

The Federal habeas corpus statute authorizes relief if, under clearly established Federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case; a state determination may be set aside under this standard if, under clearly established Federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle "should" have controlled 28 U.S.C.A. § 2254(d)(1) *Ramdass v. Angelone* 530 U.S. 156, (2000).

A state court decision is "contrary to" clearly established precedent of the United States Supreme Court, justifying Federal habeas relief, if the state court either applies a rule that contradict the governing law set forth in Supreme Court cases, or confront a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrive at a result different from Supreme Court precedent 28 U.S.C.A. § 2254 (d)(1). *Penry v. Johnson* 531 U.S. 1003, (2001).

Petitioner has suffered a "Substantial and Injurious" effect because of Justice Norvell F. Woods Jr. Reckless acts and omissions lying in his opinion to uphold a

murder for hire conviction. (See *Brecht v. Abrahamson* 507 U.S. 619, 637 (1993).

CONCLUSION

This case present some questions extraordinary circumstances whether a state Prisoner is entitled to a writ of habeas corpus or a mandamus, when a State Court of Appeal Justice has lied in his opinion to uphold a murder for hire conviction. Petitioner is "Legally Innocent" "Actually Innocent" "Factually Innocent" and labeling him as a Vexatious Litigant to keep from processing his writs of habeas corpus and his motions denying him equal protection and due process of law.

Relief sought pursuant to Rule 20. Writ should be granted in the interest of justice and unconditional relief.

Respectfully Submitted

Dated: April 26, 2006

/s/(Eddie Lee Galloway)
Eddie Lee Galloway

IN PROPRIA PERSONA

No. _____

In The

Supreme Court Of The United States

"In re Eddie Lee Galloway"

Petitioner

ON PETITION FOR AN EXTRAORDINARY WRIT
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

APPENDIX – A

APP.-1a

FILED
Nov 29 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDDIE LEE GALLOWAY,
Petitioner,
v.
CHARLES M. HARRISON, Warde
Respondent.

No. 05-75974

ORDER

Before: WALLACE, LEAVY and BERZON, Circuit Judges

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court*,557 F. 2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

Further, to the extent this mandamus petition can be construed as an application to file a second or successive 28 U.S.C. § 2254 petition in case number 05-70042, was denied

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by this court on February 10, 2005. Petitioner appears to set forth the same claims in the instant mandamus petition as were set forth in the January 10, 2005 application previously consider by the court.

APPENDIX-B

APP.-3a

[Received]
CLERK, U.S. DISTRICT COURT
Sep 14 2005
CENTRAL DISTRICT OF CALIFORNIA
By "lt" DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
SEP 27 2005
CENTRAL DISTRICT OF CALIFORNIA
BY "IT" DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDDIE LEE GALLOWAY,
CDC# D-85343
PLAINTIFF(S)
V.
CHARLES M. HARRISON,
WARDEN, ET AL.
DEFENDANT(S).

CASE NUMBER
CV 91-0231 CBM (RC)

NOTICE AND ORDER RE FILING BY VEXATIOUS LITIGANT

APPENDIX – B

APP. – 4a

EDDIE LEE GALLOWAY, plaintiff, attempted to file a pleading in the above-reference matter. Attached for your review is a copy of.

[X] Complaint / Petition

[ ] Other _____

According to court records, plaintiff has been identified as a vexatious litigant who is not permitted to file any pleading without the following:

[ ] Bond in the amount of $_____ must be posted with the filing of any new action.

[ ] No petition for writ of habeas corpus is to be filed without payment of filing fee and /or written authorization from a U.S. district judge or magistrate judge.

[X] Court order is needed to file a new action.

[ ] Court order is need to file subsequent pleadings.

[ ] Written authorization from the Chief Judge is required before filing of any document.

[ ] No filings are to be accepted in this case by plaintiff or anyone on his behalf.

[X] Other Mr. Galloway submitted $5.00 filing fee for file a Petition for Writ of H/C

APPENDIX – B

APP. – 5a

IT IS HEREBY ORDERED that plaintiff

[ ] may

[X] may not file the document presented in the above reference matter.

9-21-2005 /s/(illegible)

United States District Judge/Magistrate Judge

NOTICE AND ORDER RE FILING BY VEXATIOUS LITIGANT

CV-115 (5/99)

APPENDIX - C

APP. - 6a

PEOPLE v. GALLOWAY

The PEOPLE, Plaintiff and Respondent,

V.

Eddie Lee GALLOWAY, Defendant and Appellant,

No. B835428.

Court of Appeal, Second District, Division 7.

Sept. 11, 1990.

As Modified Sept. 21, 1990.

Defendant was convicted in the Superior Court, Los Angeles count, No. A393643, Gerald J. Levie and Michael Anthony Tynan, JJ., of first-degree murder. Defendant appealed. The Court of Appeal, Fred Woods, J., held that: (1) decision of another division denying defendant's extraordinary writ petitions constituted law of the case, and federal conspiracy to injure federal witness conviction; (2) federal conspiracy to injure federal witness conviction; (3) state constitutional prohibition against double jeopardy did not bar prosecution; and (4) there was sufficient evidence that murder of victim was linked to conspiracy to murder victim.

Affirmed in part and reversed in part.

Johnson, J., concurred and field opinion.

1. Criminal Law 1180

Prior decision of another panel of Court of Appeal that federal conviction for conspiracy to injure a federal witness did not bar state murder prosecution on double jeopardy grounds was law of the case; the acts constituting murder

were not same acts on which the federal conspiracy conviction was based and thus the prior decision was not a manifest misapplication of existing principles. West' Ann.Cal.Penal Code §§ 182, 187, 190.2(a)(1), (b), 656, 793, 12022(a)(1).

2. Criminal Law 1180

Prior decision of another panel of Court of Appeal that federal conviction for conspiracy to injure a federal witness did not bar state conspiracy to murder prosecution on double jeopardy grounds was not law of the case; the application of the law of the case doctrine produced unjust result since there was only one conspiracy and the conspiratorial acts to injure and to murder were the same. West' Ann.Cal.Penal Code §§ 182, 187, 190.2(a)(1), (b), 656, 793, 12022(a)(1).

3. Double Jeopardy 184

State constitutional prohibition against double jeopardy did not bar successive California prosecution for conduct previously adjudicated in court of another jurisdiction. West's Ann.Cal. Const. Art. 1. §15; West's Ann.Cal.Penal Code §§ 654, 656, 793, 1023.

4. Homicide 234(1)

There was sufficient evidence linking murder to conspiracy to murder involving defendant, including evidence that defendant had sent $6,000 and information regarding victim to professional in St. Louis to have victim killed and bought and paid premiums on $90,000 worth of insurance on victim's life. West's Ann.Cal.Penal Code §§ 182, 187,

Law Offices of Dennis A. Fischer, Dennis A. Fisher, Santa Monica, and John M. Bishop, Riverside, for defendant and appellant.

John K. Van de Kamp, Att. Gen., Richard B. Inglehart,

Chief Asst. Atty. Gen., Edward T. Fogel, Jr. Sr. Asst. Atty. Gen., Paul C. Ament, Supervising Deputy Atty. Gen. And Robert C. Schneider, Deputy Atty. Gen., for plaintiff and respondent.

FRED WOODS, Associate Justice.

Appellant was convicted of first degree murder with special circumstances (pen. Code §§ 187,[1] 190.2, subd. (a)(1) and conspiracy to commit first degree murder (§§ 182, 187). He was sentenced to life without possibility of parole plus one year.[2] Appellant claims the law of the case doctrine is inapplicable, that his former federal convictions barred the instant prosecution (§§ 656 and 793), and that there was insufficient evidence the murder of the victim was the result of the conspiracy to murder the victim. We affirm the murder conviction and reverse the conspiracy conviction.

FACTUAL AND PROCEDURAL BACKGROUND

On October 4, 1982, shortly before 1:00 a.m., Frank Webb was in the bathroom of his Carson home. The sliding window was fully open, covered only by a see through yellow curtain. A screen, which had covered the window was missing. Marilyn Webb, his wife, was in the kitchen getting a coke when she heard "a popping noise." She walked back to the bedroom, called "Frank," and then saw

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[1]Unless otherwise noted all statutory references are to the Penal Code.

[2]The 25 years to life sentence on count II. conspiracy, was stayed pending completion of sentence on Count I.

her husband lying on the bathroom floor. He had been shot and killed by a single .32 caliber bullet to the right side of his head.

Since appellant concedes the evidence sufficiently shows that he conspired to murder Frank Webb (victim), and that Webb was murdered, we briefly outline the events which led to the murder. Later, we separately consider appellant's claim the evidence is insufficient to link the murder to the conspiracy to murder.

In the late 1970's appellant, Frank Webb, and others formed a Memphis, Tennessee ring which falsified accidents and defrauded insurance companies. Appellant, Webb and others were indicted by federal authorities. Webb cooperated with the prosecution and aided them in surreptitiously recording appellant and other confederates. Copies of those recordings were provided to appellant and the other defendants. In trail, just before the recordings were to be played to the jury, appellant pleaded guilty to both indictments. In November 1980 he was sentenced to three years imprisonment but remained at liberty pending appeal.

Almost immediately thereafter appellant, with the assistance of others, began taking out insurance policies on Frank Webb's life. Webb was unaware of these policies. Beneficiaries were family or friends of appellant. After Webb's murder, claims were made on each of the four policies, obtained from four different companies. The claims totaled $90,000.

State and federal investigations of these claims and Webb's murder led to federal indictments of appellant and others. In February 1982 appellant was convicted in federal court, of 17 counts of mail fraud and conspiracy to commit mail fraud. All the charges involved the fraudulent insurance policies on the life of Frank Webb. (Federal

indictment 81-20330-H.) In April 1982 appellant was again indicted. These federal charges included 21 counts of mail fraud (involving the other insurance companies conspiracy to commit mail fraud, obstruction of justice and conspiracy to injure a federal witness, Frank Webb. (Federal indictment 82-20061_W.) All of these charges involved the fraudulent insurance policies on and the murder of Frank Webb. Appellant pleaded guilty to all counts.

On May 17, 1984, the Los Angeles County District Attorney filed the instant information charging appellant and others with the death penalty murder of, and conspiracy to murder, Frank Webb.[3]

Appellant sought to have the information set aside (§ 995) based upon his former federal convictions. When this motion was denied he petitioned the Court of Appeal for a writ of prohibition, seeking review of that denial. A week later, before the court of Appeal had acted on his first petition, he filed another petition for a writ of mandate and/or prohibition.

On August 15, 1985, Division 3 of this court consolidated the petitions and issued an order remanding the matter to the superior court for a clarification of its findings.

On September 27, 1985, the superior court (Judge Gerald J. Levie) made additional findings and thereafter appellant filed a supplemental petition with the Court of Appeal.

In a November 8, 1985, order the Court of Appeal, Division 3, issued its decision denying the petitions. The California Supreme Court summarily denied review.

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[3]A third count, conspiracy to commit grand theft was dismissed on motion of the district attorney.

Following a court trial on March 22. 1988, appellant was convicted.

On March 31, 1988, the penalty trial was held and on May 10, 1988, appellant was sentenced on murder conviction to life without possibility of parole plus one year. A 25 years to life sentence for conspiracy was stayed.

CONTENTIONS

Appellant contends:

1. The November 8, 1985, Court of Appeal decision is not the law of this case.

2. The federal conspiracy to injure a federal witness conviction bared the instant murder conviction.

3. The federal conspiracy to injure a federal witness conviction barred the instant conspiracy to murder conviction.

4. The California constitutional protection against double jeopardy (Cal. Const., art. I, §15) barred the instant prosecution.

5. There was insufficient evidence that the murder of the victim was linked to the conspiracy to murder the victim.

DISCUSSION

1. Appellant contends the November 8, 1985, Court of Appeal decision is not the law of this case.

As classically expressed in Tally v. Ganahl (1907_ 151 Cal. 418, 421, 90 P. 1049 the doctrine of the law of this case is this: That where, upon an appeal, the Supreme Court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout

its subsequent progress, both in the lower court and upon subsequent appeal, and as here assumed, in any subsequent suit for the same cause of action, and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular."

Since Tally the doctrine has been expanded. It applies to original proceedings (People v. Medina (1972) 6 Cal.3d 484, 491, fn. 7, 99 Cal.Rptr. 630, 492 P.2d686), Court of Appeal decisions (People v. Shuey (1975) 13 Cal.3d 835, 841, 120 Cal.Rptr. 83, 533 P.2d. 211), and criminal as well as civil matters (ibid.), irrespective of who initiated appellate review, the defendant or the prosecution (id. at p. 845, 120 Cal.Rptr. 83, 533 P.2d 211). Although, as the name indicates, the doctrine concerns only issues of law not fact (id. at p. 842. 120 Cal.Rptr. 83, 533 P.2d 211), when the doctrine applies it binds even a higher court. (Id. at p. 841, 120 Cal.Rptr. 83, 533 P.2d 211; Price v. Civil Service Com. (1980) 26 Cal.3d 257, 267, fn. 5, 161 Cal.Rptr. 475, 604 P.2d 1365)

"Application of the (doctrine) is now subject to the qualifications that 'the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision.'" (People v. Shuey, supra, 13 Cal.3d 835, 842, 120 Cal.Rptr. 83, 533 P.2d 211.)

Although law of the case is a procedural not jurisdictional doctrine (England v. Hospital of Good Samaritan (1939) 14 Cal.2d 791, 795, 97 P.2d 813), when applicable, a court is "foreclosed by the rule of procedure from redetermining the legal (issue)." (People v. Shuey, supra, 13 Cal.3d at p. 843, 120 Cal.Rptr. 83 533 P.2d 211.) Its attempt to do so is error. (Id. at p. 845, 120 Cal.Rptr. 83 533 P.2d 2aa.).

The rationale for the doctrine is described by Shuey. "From a policy standpoint it is not difficult to envisage the frustrating consequences that could flow from a practice allowing different panels of the Court of Appeal to redetermine issues which were disposed of on a previous appeal in the same case. For example, if the reasoning of Shuey II (115 Cal.Rptr. 447) were to control, the matter would be remanded for yet a third hearing. The trial court, under its mandate, would then consider the arrest theory. Among the various results which might emerge from such a hearing could be a finding that the occupation of the Shuey apartment constituted a valid arrest, thus rendering moot the original question whether the discovery of the contraband was factually caused by the "illegality." After the denial of their motion to suppress, defendants might again seek pretrial review in another proceeding entitled 'Shuey v. Superior Court.' This third appellate panel might correctly conclude that the decision in Shuey II was erroneous that Shuey I (30 Cal.App.3d 535, 106 Cal.Rptr. 452) was controlling, and remand yet again for consideration of the issue of causation. The mind boggles at the possibilities which could arise should the People be no more successful at the fourth hearing than they were at the second. Shuey IV followed by Shuey V? Theoretically there could be no certain termination of this sequence, and the parties potentially could find themselves in a Catch-22 position of receiving an infinite lesson in aberrations of appellate procedure." (People v. Shuey, supra, at pp. 840-841, 120 Cal.Rptr. 83, 533 P.2d 211.)

Appellant does not dispute two of the requisites for invoking the law of the case doctrine. By his 1985 petitions he presented the issues of double jeopardy, former conviction, and collateral estoppel.

Additionally, appellant does not dispute that a determination of those issues was necessary to the court's decision. But appellant does contend that the doctrine requires an "opinion" and the November 9, 1985, decision was merely an "order."

The Court of Appeal decision, entitled an "ORDER," read as follows: "THE COURT: (1) The above entitled petitions for writ of mandate and prohibition have been read and considered. The petitions are consolidated for purposes of these proceedings. (1) this court has determined that there is no double jeopardy bar to prosecution in this state because: (1) California has jurisdiction to prosecute petitioners; (2) California has a compelling state interest in protecting a California resident where the conspiracy to commit murder is formed outside this state; (3) the additional act required for prosecution in California subsequent to a federal action in Tennessee is the killing (see People v. Walker (1981) 123 Cal.App.3d 981, 177 Cal.Rptr. 147; People v. Belcher (1974) 11 Cal.3d 91, 113 Cal.Rptr. 1, 520 P.2d 385; People v. Comingore (1977) 20 Cal.3d 142, 141 Cal.Rptr. 542, 570 P.2d 723); and (4) federal and state interest are substantially different which state interest has not been vindicated by the federal action. Therefore, there is no constitutional, statutory or collateral estoppel bar to prosecution in California. (1) The petitions are denied."

Rosato v. Superior Court (1975) 51 Cal.App.3d 190 124 Cal.Rptr. 427, principally relied upon by appellant and characterized by him as involving "essentially identical circumstances," is distinguishable. Rosato describes its earlier denial of a petition for a writ of prohibition as "summary," containing only "an explanatory comment" which Rosato did not regard as a "formal opinion." (Id. at p. 230, 124 Cal.Rptr. 427.) Since Rosato fails to include its earlier decision as part of its opinion we are bound by

Rosato's characterization of it, a characterization that does not describe the subject November 8, 1985, decision.

Rather, the November 8, 1985, decision is analogous to this order, held to be a decision on the merits and constituting the law of the case:

"THE COURT: The petition for writ of prohibition, filed April 28, 1976, has been read and considered. The court has also read and considered the points and authorities of real party in interest in opposition, field May 3, 1976. It appearing that the record supports the implied finding of the trial court that the superior court action was field for purpose of delay, the petition is denied." (Richer v. Superior Court (1976) 63 Cal.App.3d 748, 753, 134 Cal.Rptr. 52.)

Moreover, in Rosato when the court initially denied the petition it "did not have the full record" (Rosato v. Superior Court, supra, 51 Cal.App.3d at p. 231, 124 Cal.Rptr. 427), a claim not here made.

A second obstacle to applying the law of the case doctrine, appellant asserts, is that its purpose, judicial economy, would not be served. Searle and Nally are cited as authority for this proposition.

Searle v. Allstate Life Ins. Co. (1985) 38 Ca.3d 425, 212 Cal.Rptr. 466, 696 P.2d 1308 involved two trials. Following the first, the Court of Appeal reversed, holding that only a "sane" person can commit "suicide." When the Supreme Court reviewed the second trial it refused to be bound by the mistaken Court of Appeal holding because other error, requiring reversal, had been committed. it said, "the fact that reversal is necessary in any event frees us from the compulsion that the rule of law case might otherwise impose on us...." (Id. at p. 435, 212 Cal.Rptr. 466, 696 P.2d 1308.) Nally v. Grace Community Church (1988) 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 follows Searle in holding the

law of the case doctrine inapplicable when reversal is otherwise required.

Searle and Nally are inapposite and appellant's assertion is mistaken. Unlike Searle and Nally, appellant has not demonstrated that the law, as decided by the November 8, 1985, opinion, is erroneous. Nor has appellant established that the instant judgment, on independent grounds, must be reversed. Finally, although "judicial economy" alone does not determine whether or not law of the case doctrine applies (see, e.g., Pigeon Point Ranch, Inc. v. Perot (1963) 59 Cal.2d 227, 28 Cal.Rptr. 865, 379 P.2d 321), here judicial economy would be served by applying the doctrine. Except for appellant's narrow insufficiency of evidence contention, applying law of the case silences appellant's contentions, requires an affirmance of the judgment, and save for higher review, terminates this litigation.

Appellant makes still a third objection. He argues that the court which issued the November 8, 1985, opinion denied him oral argument opportunity and therefore its opinion cannot have law of the case effect.

While it is true that appellant was not afforded an opportunity to orally argue, we conclude that such an opportunity is not essential to law of the case.

In People v. Brigham (1979) 25 Cal.3d 283, 157 Cal.Rptr. 905, 599 P.2d 100 the Supreme Court held that there is a right to orally argue on appeal. (Id. at pp. 286, 289, 157 Cal.Rptr. 905, 599 P.2d 100.) The Court of Appeal, in summarily disposing of the defendant's appeal of his robbery convictions without allowing oral argument, committed error.

Brigham did not hold, despite a single stray quoted reference to "original proceeding(s)' (Id, at p. 286, 157 Cal.Rptr. 905, 599 P.2d 100), that such a right applied to

original proceedings.

People v. Medina, supra, 6 Cal.3d 484, 99 Cal.Rptr. 630, 492 P.2d 686 is also distinguishable. There a Court of Appeal, by minute order and without an opinion, summarily denied a petition seeking review of an order denying a motion to suppress evidence (§ 1538.5). Medina held that this "postcard" denial was not the law of the case. Although it cited denials of oral argument, the buttresses for the court's holding were the constitutional mandate that "decisions... shall be in writing with reasons stated" (Cal. Const., art. VI §14 and avoidance of "improper conjecture and surmise as to the theoretically possible mental processes of the justices." (People v. Mendian, supra, at p. 492, 99 Cal.Rptr. 630, 492 P.2d 686.)

Similarly unpersuasive is People v. Getty (1975) 50 Cal.App.3d 101, 123 Cal.Rptr. 704 where in a footnote (id. at p. 106, fn. 3, 123 Cal.Rptr. 704), the court discussed the inapplicability of law of the case, notwithstanding that both parties agreed the doctrine was inapplicable. (Ibid.) Getty cited "no opportunity for oral argument: (ibid.) as a procedural defect but substantively concluded "that applying the 'law of the case' doctrine... would result in our deliberate enforcement of 'a manifest misapplication of existing principles resulting in substantial injustice.' " (Ibid.)

An opportunity to orally argue was not afforded in either Pigeon Point Ranch, Inc. v. Perot, supra, 59 Cal.2d 227, 28 Cal.Rptr. 865, 379 P.2d 321 nor Richer v. Superior Court, supra, 63 Cal.App.3d 748, 134 Cal.Rptr. 52 but the doctrine was, nevertheless, held applicable in both. (See also People v. Scott (1976) 16 Cal.3d 242, 128 Cal.Rptr, 39, 546 P.2d 327 and People v. Shuey, supra, 13 Cal.3d 835, 120 Cal.Rptr. 83, 533 P.2d 211 which do not mention oral argument as essential to law of the case.)

We find that appellant had adequate opportunity to fully present and argue his views, although in writing only, and that the record, over three inches thick, did not require oral argument in order for the November 8, 1985, decision to have law of the case effect.

Appellant's final protest is that application of the doctrine would result in an "unjust decision."[4] "This broad exception has evolved gradually as courts strove to avoid the harsh consequences which may result from a strict application of the rule." (People v. Shuey, supra, at p. 845, 120 Cal.Rptr. 83, 533 P.2d 211.)

But, as Shuey observed, "if the rule is to be other than an empty formalism more must be shown than that a court on a subsequent appeal disagrees with a prior appellate determination." (Id. at p. 846. 120 Cal.Rptr. 83, 533 P.2d 211.) In order to satisfy the "unjust decision." test "judicial order demands there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice before an appellate court is free to disregard the legal determination made in a prior appellate proceeding." (Ibid.) (Emphasis added.)

Therefore, ironically, in order to give law of the case effect to the November 8, 1985, opinion, and not redetermine legal issues it decided, we must consider those same legal issues if only to be sure there has been no "manifest misapplication of existing principles."

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[4]Appellant refers to his unjustified prosecution and punishment as satisfying this "unjust decision" test. Shuey provides a different definition.

We, thus, defer our conclusion concerning law of the case until we consider appellant's other, affected contentions.

2. Appellant contends the federal conspiracy to injure a federal witness conviction barred the instant murder conviction.

Section 656 provides: "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another State, Government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is State, Government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense."[5] It is not disputed that "on the trial" of appellant "it appear(ed)" he had convicted under the laws "of another government." If that conviction, federal conspiracy to injure a federal witness, was "founded upon the act" for which appellant was on trial for murder, then he had a sufficient defense.

Comparatively few cases have construed the section 656 phrase "founded upon the act." The first to do so was People v. Candelaria (1956) 139 Cal.App.2d 432, 294 P.2d 120 (Candelaria I). Candelaria robbed a federal depository bank teller of about $950, was promptly arrested, charged in federal court with bank robbery, and pleaded guilty. But when the federal judge modified his original five year sentence to 60 days the district attorney charged the defendant with robbery (of the same bank teller). The trial

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[5]Section 793, a related provision, reads: "When an act charged as a public offense is within the jurisdiction of another State or country, as well as of this State, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment thereof in this State."

court rejected the defendant's former conviction and double jeopardy pleas and defendant was again convicted.

In reversing the conviction and explicating "founded upon the act," the court stated, "the federal prosecution and the state prosecution related to the one robbery involving the same Ida Holland, and both prosecutions related to the same taking of the same money at the same time and place. The only additional element involved in the federal prosecution was that the money belonged to a national bank whose deposits were federally insured. The additional element, regarding the status of title to or insurance on the money, pertained to the matter of jurisdiction of the federal court, and it did not pertain to any activity on the part of defendant in committing robbery. The physical act or conduct of defendant in taking the money was the same whether the robbery be considered a federal or state offense. All the acts constituting the state offense were included in the federal offense and were necessary to constitute the federal offense.

It is clear that, within the meaning of said section 656, the federal conviction was 'founded upon the act' in respect to which the defendant was tried in the present case. It appears, as a matter of law, that the previous federal conviction is a sufficient defense in the present case." (Id. at p. 440, 294 P.2d 120.)

The message of Candelaria I is clear and was not lost on the district attorney. He promptly charged the defendant with burglary. Again defendant's double jeopardy and former conviction defenses were rejected and again defendant was convicted. In reviewing the burglary conviction and denying defendant's section 656 defense

Candelaria II stated, "The 'act' spoken of in the statute must be 'the same act.' The burglary act complained of in the present case, that is, the entering of the building with the intent to commit a theft, is not the same act complained of in the federal court, namely, that he pointed a gun at the teller and by force and fear compelled her to deliver over to him certain monies." (People v. Candelaria (1957) 153 Cal.App.2d 879, 884, 315 P.2d 386.)

People v. Williams (1971) 18 Cal.App.3d 925, 96 Cal.Rptr. 291 is consistent with both Candelaria decisions. Williams was convicted, in federal court, of possession of stolen mail and then, in state court, convicted of forgery. On affirming the forgery conviction and rejecting the section 656 defense Justice Jefferson commented, "In the case at bench, the federal offense was the possession by defendant of stolen United States mail. It made no difference wither the mail contained the checks that defendant was convicted of forging or not. On the other hand, the gist of the forgery statute is that any person who, with intent to defraud signs the name of another person, or of a fictitious person, knowing he has no authority so to do, or falsely makes any check or utters, publishes or passes any check or attempts to pass any check as true and genuine is guilty of forgery. None of these elements have any connection with the possession of stole mail. Here, the testimony hardly would be applicable to both offenses. The check on which the forgery conviction was based was in no way connected with possession of stolen mail in the federal offense. Sections 656 and 1023 Penal Code are not a bar in this case because the prosecution is for different offenses, founded upon different acts." (Id. at p. 928, 96 Cal.Rptr. 291.)

The first Supreme Court decision to interpret section 656 is People v. Belcher (1974) 11 Cal.3d 91, 113 Cal.Rptr. 1, 520 P.2d 385. Belcher and an accomplice were to drive two

"narcotic buyers" to a buy site.

The "narcotic buyers" were undercover federal and state narcotic agents and their chauffeurs were robbers. Upon arrival at the buy site, Belcher and his accomplice drew guns, took the agents' wallets and $400 of federal "buy funds."

In federal court, Belcher was tried for assault upon a federal officer engaged in official duties. He was acquitted. he was then charged in state court with two counts of robbery and one count of felony assault. At trial, defense counsel only raised the former acquittal defense by a motion to dismiss and failed to specify section 656 or any other statutory basis for the motion. The trial court denied the motion and Belcher was convicted of all three charges.

On appeal, the California Supreme Court considered the former acquittal defense (§ 656) through the prism of ineffective assistance of counsel. It noted "at the outset that prosecution and conviction for the same act by both state and federal governments are not barred by the constitutional protection against double jeopardy. (Abbate v. United States (1959) 359 U.S. 187, 194-195 (79 S.Ct. 666, 670-671, 3 L.Ed.2d 729); Bartkus v. Illinois (1959) 359 U.S. 121, 136 (79 S.Ct. 676, 685, 3L.Ed.2d 684); United States v. Lanza (1922) 260 U.S. 377, 382 (43 S.Ct. 141, 142, 67 L.Ed. 314)." [6] (People v. Belcher, supra, at pp. 96-97, 113 Cal.Rptr. 1, 520 P.2d 385.) It also observed that states could, and California did, provide greater double jeopardy protection than afforded under the Fifth Amendment of the

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[6]Grady, District Attorney of Dutchess County v. Corbin (1990) - U.S.-, 110 S.Ct. 2084, 109 L.Ed.2d 548, which construes the double jeopardy clause and does not affect the Abbate-Bartkus rule, is inapposite.

United States Constitution. (Id. at p. 97, 113 Cal.Rptr. 1, 520 P.2d 385.)

Additionally, it pointed out that section 654,[7] whose scope and applicability differed form section 656, did not apply to successive federal and state prosecutions. (Id. at pp. 97-98, 113 Cal.Rptr. 1, 520 P.2d 385.)

In addressing section 656 the court recited the facts of Candelaria I and Candelaria II and stated, "These two cases—both involving the same defendant and transaction but charging separate offenses—clearly demonstrate the meaning to be given the terms 'act or omission' as they are used in section 656. Under this section, a defendant may not be convicted in another jurisdiction if all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution (People v. Candelaria, supra, 139 Cal.App.2d 432, 440 [294 P.2d 120); however, a conviction in this state is not barred where the offense committed is not the same act but involves an element not present in the prior prosecution. (People v. Candelaria, supra, 153 Cal.App.2d 879, 884 (315 P.2d 386].)" (Id. at p. 99, 113 Cal.Rptr. 1, 520 P.2d 385.)

The court then applied this test to the felony assault conviction, count three.

"Under this test, defendant Belcher's conviction on the third count—assault with a deadly weapon upon Officer

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[7]The section reads: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

Johnson -- must be reversed. The Attorney General concedes that the state conviction requires proof of the same acts by defendant as the federal conviction. Since defendant was acquitted of assault upon Johnson in federal court, he cannot be convicted for the same assault upon the same person in the subsequent state prosecution." (Ibid.) (Original emphasis.)

To the attorney general's argument that section 656 was inapplicable because the federal offense included an element absent from the state offense, viz. that the assault victim was a federal officer engaged in official duties, the court cited Candelaria I, which rejected the identical argument, and adopted its reasoning: "conviction of the federal offense required proof of no additional act on the part of defendant; it merely required proof of the status of the victim...." (Id. at p. 100, 113 Cal.Rptr. 1, 520 P.2d 385.) (Original emphasis.)

Applying the same test to the robbery convictions, the court's analysis paralleled Candelaria II: "However, when we apply the test of section 656 to defendant's conviction upon the first and second counts-robbery of Johnson and robbery of Norton, respectively—we reach a different result. A conviction for each of these requires at the very least proof of an important additional act by defendant-the 'taking of personal property in a possession of another' (§ 211)—that need not be proved to establish the federal offense of assault with a deadly weapon upon federal officer. Accordingly, the convictions of first degree robbery under the first two counts are not convictions founded upon the same act or omission for which defendant was acquitted in federal court, and these convictions must stand." (Id. at pp. 100-101, 113 Cal.Rptr. 1, 520 P.2d 385.)

People v. Comingore (1977) 20 Cal.3d 142, 141 Cal.Rptr. 542 570 P.2d 723 answered two questions not directly raised in Candelaria or Belcher: whether the

coverage of section 793 see fn. 5 differed from section 656 and whether a different mental state constituted a different "act."

Comingore stole a car in California and drove it to Oregon. There he was charged with and convicted of using another's vehicle without consent. Although sentenced to a maximum six month term he was released on "bench parole" after four days. California authorities then charge him with grand theft auto (§ 487, subd. (3)) and felony joyriding (Veh.Code, § 10851). The trial court dismissed the charge and the People appealed. The Supreme Court held that the coverage of sections 793 and 656 is identical (id. at p. 148-149, 141 Cal.Rptr. 542, 570 P.2d 723) and that, for section 793 and 656 purposes, intent is not an ingredient of an "act." Therefore, although the mental state of the Oregon and California offenses were different, the prohibited act of the defendant was the same for both offenses. The dismissal was affirmed.

People v. Walker (1981) 123 Cal.App.3d 981, 177 Cal.Rptr. 147, consistent with Belcher and Comingore, held that a Nevada conviction of receiving stolen property (checks stolen in a California robbery) did not bar a California robbery conviction.

Most similar to the instant case is People v. Brown (1988) 104 Cal.App.3d 1444, 251 Cal.Rptr. 889. Brown and four confederates, while in Nevada, planned a burglary of a California jewelry store. According to the plan, apparently, they would burglarize the store, take the jewelry, and return with it to Nevada. Their plans were secretly recorded by a police informant resulting in the mass arrest after two of them had entered the jewelry store.

All five defendants, in federal court, were convicted of conspiracy, i.e., and conspiracy to transport stolen property

(the jewelry) in interstate commerce.

Then all five defendants, in California state court, were charged with burglary. They asserted a former conviction defense (§ 656). The defense was denied and all were convicted.

In rejecting defendants' former conviction defense (§ 656), the majority opinion in People v. Brown did not merely rely on the theoretically different acts required by conspiracy and burglary. Theoretically, conspiracy requires only the act of agreement while theoretically burglary requires an act of physical entry into a structure (with requisite intent). But, as People v. Brown recognized, "one may be guilty of burglary without personally entering a place" (id., at p. 1451, 251 Cal.Rptr. 889) and in Brown only two of the five defendants convicted of burglary had entered "the place."

Thus People v. Brown was forces to consider whether the "acts" of those defendants who did not enter the jewelry store but with, nevertheless made them principals for that entry, were the same "acts" that made them guilty of conspiracy. If the two sets of "acts" were identical then, according to People v. Brown[8] (id, at p. 1451, 251 Cal .Rptr. 889), the burglary conviction was barred by the conspiracy conviction. Brown found that the two sets of "acts" were disparate, not identical, and therefore the section 656 defense inapplicable.

[1] With these principles and applications in mind we turn to the instant matter and consider whether appellant's acts constituting that which he was convicted of murder.

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[8]Justice Blease wrote separately, concurring in the judgment, agreeing with the majority's conclusion that section 656 did not bar the burglary conviction, but disagreeing with the majority's reasoning. He did not, as the editor's summary mistakenly states, dissent.

According to the federal indictment (No. 82-20061-W) appellant committed the crime of conspiracy to injure a federal witness, Frank C. Webb, by his act of agreeing with two other conspirators that Frank C. Webb be injured and by his two acts in furtherance of that agreement, viz., registering at the Los Angeles Airport Ramada inn on August 7, 1981, and attempting to photograph Frank C. Webb's home in Carson on August 9, 1981.

As in People v. Brown, appellant has failed to demonstrate that it was these acts upon which his murder conviction was based. The record suggests the opposite. E.g., the trial court found "beyond a reasonable doubt that the murder of Mr. Webb was intentional and was aided and abetted, counseled (sic), commanded, induced and solicited and required by the defendant, Eddie Lee Galloway, for financial gain within the meaning of Penal Code sections 190-2(A)(1) and 190.2(B)"

Unrelated to appellant's "conspiracy acts" was the testimony of Janet Gillespie who described what appellant said to her in October 1980: "He said that Frank was a mother fucking snitch and that they had set him up and told the cops all kinds of shit and that he was going to pay for it, that he was going to die....[¶] And he said he wasn't going to be there when—or lay a hand on him, but that he had to die."

Even more damning was the testimony of Arthur Thomas, a fellow prison inmate of appellant's and a government informant. Appellant, according to Thomas' testimony, paid Raymond Parker, appellant's cousin $1500 to kill Webb. When Parker told appellant he had done so appellant called Webb's house and found out Parker had lied because Webb answered the phone. Thomas testified that then appellant said he took a photograph of Webb, a photograph of Webb's

house, Webb's social security number, and $6000 and sent them all to a professional in St. Louis to have Frank C. Webb killed.

The acts constituting appellant's culpability for murder not being identical to the acts constituting appellant's culpability for conspiracy to injure a federal witness, his conspiracy conviction did not bar his murder conviction.

We therefore hold that the November 8, 1985, decision by Division 3 of this court was not "a manifest misapplication of existing principles," that it constitutes the law of this case, and accordingly appellant's contention that section 656 bars his murder conviction is rejected.

3. Appellant contends the federal conspiracy to injure a federal witness conviction barred the instant conspiracy to murder conviction.

[2] The attorney general argues that section 656 is inapplicable to the instant conspiracy to murder conviction because the "act of agreeing to injure someone and the act of agreeing to injure someone and the act of agreeing to kill someone are very different." We find that observation irrelevant. Although the federal indictment charged only a conspiracy to injure Frank Webb and the instant information charged a conspiracy to murder him, there was, indisputably, only one conspiracy. Just as the pleading discrepancy between the Oregon charge[9] and the California charges[10] was held irrelevant in People v. Comingore because the defendant's act of unlawfully driving another's vehicle was

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[9]Using another's vehicle without consent.

[10]Grand theft auto and felony joyriding.

the same for all the charges, so here the conspiratorial acts were the same. The only conspiracy was to murder Frank Webb (and defraud the insurance companies). That, for jurisdictional or pleading purposes, the federal indictment cast the conspiracy as one "to injure" did not alter appellant's acts.

Since Belcher and Comingore require that we use the elements of the charges, as we would a viewfinder, to focus on the defendant's acts, we do so and find a single image. There was one conspiracy and one act of acts evidencing that conspiracy.

The November 8, 1985, opinion is inconsistent with our conclusion and, in order to avoid an unjust result, we conclude that it does not, in this instance, constitute the law of the case.

We hold that pursuant to section 656 appellant could not be convicted of conspiracy to murder.

4. Appellant contends the California constitutional protection against double jeopardy (Cal. Const., art. I, § 15) barred the instant prosecution.

[3] Appellant claims that "[n]o reported decision addresses the application of this state's constitutional prohibition against double jeopardy (Cal. Const., art. I, § 15)[11] to a

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[11]It reads: "The defendant in a criminal cause has the right to speedy public trial to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witness against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel. [¶] Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law."

successive California prosecution for conduct previously adjudicated in the court of another jurisdiction' and then urges us to adopt an "Interest analysis" test promulgated by the Pennsylvania Supreme Court (Commonwealth v. Mills (1971) 447 Pa. 163, 286 A.2d 638) and developed by the Michigan Supreme court (People v. Cooper (1976) 398 Mich. 450, 247 N.W.2d 866; People v. Gay (1980) 407 Mich. 681, 289 N.W.2d 651).

Contrary to appellant's claim, the issue is not one of first impression. It was considered and rejected in People v. Candelaria, supra, 153 Cal.App.2d 879, 883, 315 P.2d 386.[12]

In light of California's comprehensive statutory protection against double jeopardy and multiple prosecution (§§ 656. 793, 1023, and 654) we decline to expand that protection by discovering some new meaning in our constitutional prohibition ("Persons may not twice be put in jeopardy for the same offense." Cal. Const., art. I, § 15)[13]

We conclude that the instant prosecution was not barred by the California constitutional protection against double jeopardy.

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[12]Candelaria considered California Constitution, article I, section 13, clause 4, the predecessor and identical provision to article I, section 15.

[13]We also reject appellant's contingent contention that this constitutional provision barred the special circumstance finding and sentence of life imprisonment without possibility of parole.

5. Appellant contends there was insufficient evidence that the murder of the victim was linked to the conspiracy to murder the victim.

[4] "An appellate court must view the evidence in the light most favorable to the respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with contrary finding does not warrant a reversal of the judgment. The test on appeal is whether substantial evidence supports the conclusion of justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with contrary finding does not warrant a reversal of the judgment. The test on appeal is whether substantial evidence supports the conclusion of the tier of facts, not whether the evidence proves guilt beyond a reasonable doubt.

The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (People v. Reilly (1970) 3 Cal.3d 421, 425, 90 Cal.Rptr. 417, 475 P.2d 649. Interior cites and quotation marks omitted.)

The following evidence satisfies the substantial evidence test establishes the nexus between appellant's conduct and the victim's death: appellant sent a photograph of the victim, a photograph of the victim's house, the victim's social security number and $6000 to a professional in St. Louis to have the victim killed; the victim appeared to have been killed by professional: the bathroom screen was removed and never found; no fingerprints or other physical evidence were

recovered; the killer apparently waited until all the victim's house guest had left and until the victim was alone in his lighted bathroom before firing a single, fatal shot to the victim's head; appellant had bought and paid premiums on $90,000 worth of life insurance, an investment which depended on the victim's death.

DISPOSITION

The judgment with respect to count I, conviction of first degree murder with special circumstance and firearm enhancement and sentence of life imprisonment without possibility of parole plus one year, is affirmed. The judgment with respect to count 2 is reversed. The $100 restitution fine order is stricken.[14]

LILLIE, P.J., concurs.

JOHNSON, Associate Justice.

Although I concur with the majority's disposition of this case, I write separately to reveal the trap our law of the case doctrine lays for the unwary.

As the majority correctly states, under the current law the summary denial of an extraordinary writ petition may constitute law of the case. However, the summary denial of a writ petition, which results in an opinion differs greatly from

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[14]The trial court imposed a restitution fine of $100 pursuant to Government Code section 13967, subdivision (a). This section is inapplicable to crimes committed before its January 1, 1984, operative date. (People v. McCaskey (1985) 170 Cal.App.3d 411, 216 Cal.Rptr. 54; People v. Downing (1985) 174 Cal.App.3d 667, 672, 220 Cal.Rptr. 225.) By respondent's failure to address this issue we infer his concession of it.

all other writ dispositions in the procedural safeguards provided the parties.

Where the reviewing court issues an order to show cause or grants an alternative writ, the disposition of the petition mirrors that of an ordinary appeal. The parties are permitted to orally argue their case and, following the issuance of the opinion either granting or denying the writ, an opportunity to petition the court for hearing. (See generally Bay Development Ltd. v. Superior Court (1990) 50 Cal.3d 1012, 1024, 269 Cal.Rptr. 720, 791 P.2d 290.)

Where the court issues a peremptory writ the parties may not be permitted oral argument. However, all of the parties receive prior notice of the court's intent to issue the peremptory writ and the respondent and/or the real party in interest may submit briefing on the issues presented. (Palma v. U.S. Industrial Fasterners, Inc. (1984) 36 Cal.3d 171, 178-180, 203 Cal.Rptr. 626, 681 P.2d 893.)

Further, after issuance of the peremptory writ, the losing party may petition, the court for rehearing. (Rules of Court, rule 27(a).) In the rehearing petition, the losing party is provided the opportunity to alert the appellate court to any mistakes of law of misunderstanding of facts which resulted in an incorrect decision. (See San Francisco v. Pacific Bank (1891) 89 Cal. 23, 25, 26 P.615, 835; 9 Witkin, Cal.Procedure (3d ed.1985), Appeal, § 683, pp. 655-656.)

However, when a court summarily denies a writ petition, the petitioner is provided neither oral argument nor the opportunity to petition for hearing. (Rules of Court, rule 27(a).) Thus, if the reviewing court is mistaken in its understanding of the facts of the law, there is no opportunity to correct the mistake. The opinion is immediately final and the only remaining avenue for review is a petition for review

before the Supreme Court. However, this provides no remedy.

The Supreme Court's function is not to review an inferior court's opinion for error; generally, it is to resolve significant legal issues or to secure uniformity of decision. (Rules of Court, rule 29(a).) Accordingly, the petitioner is unable to successfully petition for review and is left with an opinion which is erroneously decided but which cannot be subject to correction. Further, that opinion can now become law of the case, precluding the petitioner form raising the issue directly on appeal.

Accordingly, a petitioner is presented with a serious dilemma. If he seeks extraordinary relief, he may return with an erroneous opinion from which he has on recourse. However, since the very nature of extraordinary relief implies the petitioner has not adequate remedy at law, he cannot wait until his appellate rights mature and he can brief the issue with all of the procedural protection to which he is entitled.

I recognize the law of the case doctrine is a rule of procedure and therefore, a prior appellate decision is not necessarily binding upon other appellate courts. Further, the doctrine does not apply where it will result in an unjust decision. However, I cannot ignore that for purposes of comity and convenience the second court will, except in extraordinary circumstance, defer to the opinion of the first court.

Further, this deference to law of the case is almost mandated to the extent the doctrine applies to the trial courts. A trial court has little discretion to disregard law of the case unless there has been intervening precedent which reaches a different result. (Ryan v. Mike-Ron Corp. (1968) 259 CalApp. 2d 91, 99, 66 Cal.Rptr. 224; see People v. Sequeira